Supreme Court, U.S.
FILED
07-870 OCT 25 2007
OFFICE OF THE CLERK

78

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

_____ Term, 2007

TOM H. WHITESIDE,
Petitioner
v.
CARR, HUNT & JOY, L.L.P., DONALD M. HUNT, LATRELLE BRIGHT JOY AND GARY BELLAIR,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF APPEALS FOR THE SEVENTH DISTRICT

PETITION FOR WRIT OF CERTIORARI

Tom H. Whiteside*
WHITESIDE LAW FIRM
1001 Texas Avenue, Suite 135
Lubbock, Texas 79401
Phone: (806) 687-9009
Facsimile: (806) 687-9011
* Counsel of Record, Member Supreme Court Bar

QUESTION PRESENTED

Did the Texas Court of Appeals' overly restrictive analysis of Plaintiffs well recognized common law breach of contract claim and refusal to order documents submitted *in camera* violate the Due Process Clause of the U.S. Constitution?

LIST OF PARTIES TO THE PROCEEDINGS

Petitioner Tom H. Whiteside, hereinafter Whiteside, was the plaintiff in the District Court, appellant in the Seventh Court of Appeals and petitioner in the Texas Supreme Court.

Carr Hunt & Joy, L.L.P., Donald M. Hunt, Latrelle Bright Joy and Gary Bellair, hereinafter CHJ, were the defendants in the District Court, appellees in the Court of Appeals for the Seventh District and respondents in the Texas Supreme Court.

ABBREVIATIONS

Parties	*Abbreviations*
Gary Bellair	Bellair
Carr Hunt & Joy, L.L.P.	CHJ
Donald M. Hunt	Hunt
Latrelle Bright Joy	Joy
Mullin Hoard & Brown, L.L.P.	MHB
Joe H. Nagy, Sr.	Nagy
Tom H. Whiteside	Whiteside

TABLE OF CONTENTS

Page

QUESTION PRESENTED.....ii

LIST OF PARTIES TO THE PROCEEDINGS.....iii

ABBREVIATIONS.....iv

TABLE OF AUTHORITIES.....v

OPINIONS BELOW.....2

JURISDICTION.....4

RELEVANT STATUTORY PROVISIONS INVOLVED.....6

STATEMENT OF THE CASE.....8

HOW THE ISSUES WERE DECIDED BELOW.....14

REASONS TO GRANT THE WRIT.....22

1. Due Process denial of access
   a. Applicable Law.....22
   b. Application to Arbitration.....34
   c. The Vanishing Trial.....37
2. The Court of Appeals denial of Due Process.....39

CONCLUSION.....50

TABLE OF CONTENTS - (cont.)

Page

APPENDIX.....51

COURT OPINIONS

Arbitration decision signed
October 25, 2005.....Tab 1

Nagy denies Whiteside's Motion to
Modify or Correct the Award on
November 18, 2005.....Tab 2

On December 1, 2005 Nagy
denies Whiteside's request
of October 28, 2005 to rule that
the Partnership Agreement had
been breached and Whiteside's
request for documents showing
CHJ's dealings with MHB.....Tab 3

Trial Court denying Motion to
Reconsider dated February 2, 2006.....Tab 4

Trial Court Judgment signs Order
Denying Plaintiff's Motion to
Vacate Arbitration Award,
Denying Plaintiff's Motion to
Submit Documents *In Camera*
and Confirming the Arbitration
Award signed February 13, 2006.....Tab 5

TABLE OF CONTENTS - (cont.)

Court of Appeals for the Seventh
District's Memorandum Opinion
denying Whiteside's Petition for
Writ of Mandamus on June 2, 2006.....Tab 6

Court of Appeals for the Seventh
District's Memorandum Opinion
on Motion for Rehearing of
Mandamus dated June 27, 2006.....Tab 7

Court of Appeals for the Seventh
District's Memorandum Opinion
on arbitration award and Motion
to Compel Production of Documents
dated January 23, 2007.....Tab 8

The Texas Supreme Court denying
Whiteside's Motion to Stay and
Petition for Writ of Mandamus
on February 17, 2007.....Tab 9

The Court of Appeals for the Seventh
District denying Whiteside's Motion
for Rehearing on February 27, 2007....Tab 10

The Texas Supreme Court denying
Whiteside's Petition for Review on
June 1, 2007.....Tab 11

TABLE OF CONTENTS - (cont.)

The Texas Supreme Court denying Whiteside's Motion for Rehearing of Whiteside's Petition for Review on July 27, 2007.....Tab 12

CONSTITUTION AND STATUTES

FEDERAL CONSTITUTION

U.S. CONSTIT. AMENDMENT V.....Tab 13

U.S. CONSTIT. AMENDMENT XIV § 1.....Tab 13

FEDERAL STATUTE

28 U.S.C. § 1257(a).....Tab 13

TEX. BUS. ORG. CODE

§ 152.002 (Vernon 2004-2005)....Tab 13

§ 152.601 (Vernon 2004-2005)....Tab 13

TEX. CIV. PRAC. REM. CODE

§ 171.050.....Tab 13

§ 171.051.....Tab 13

§ 171.086 Arbitration.....Tab 13

§ 171.088.....Tab 13

§ 171.088(a)(3)(A).....Tab 13

§171.088(a)(3)(C).....Tab 13

TEXAS CONSTITUTION

art. I § 13.....Tab 13

TABLE OF CONTENTS - (cont.)

TEXAS GOVERNMENT CODE ANN.
§ 22.001a(3).....Tab 13
§ 22.221.....Tab 13

IMPORTANT DOCUMENTS

CHJ Partnership Agreement signed
March 1, 1995.....Tab 14

Whiteside's withdrawal letter dated
and signed October 31, 2000.....Tab 15

Written arbitration stipulations
dated September 27, 2005.....Tab 16

Whiteside's Letter Supplement
to Arbitration Brief dated
September 28, 2005.....Tab 17

Letter from Whiteside to Nagy
dated October 28, 2005.....Tab 18

Letter from CHJ to Nagy dated
November 4, 2005.....Tab 19

Letter from Whiteside to Nagy
dated November 21, 2005.....Tab 20

Letter from Whiteside to Nagy
dated December 2, 2005.....Tab 21

TABLE OF CONTENTS - (cont.)

Motion to Vacate Arbitration Award filed January 12, 2006 in the Trial Court.....Tab 22

Plaintiff's Motion to Submit Documents In Camera filed January 26, 2006 in the Trial Court.....Tab 23

First Supplement to Plaintiff's Motion to Submit Documents *In Camera* filed January 26, 2006 in the Trial Court.....Tab 24

Plaintiff's Brief in Support of Motion to Vacate Arbitration Award and Motion to Submit Documents *In Camera* filed January 27, 2006.....Tab 25

Petitioner Whiteside's Motion for Rehearing of Writ of Mandamus filed June 8, 2006 in the Court of Appeals for the Seventh District.....Tab 26

Whiteside's Appellant Brief to the Court of Appeals for the Seventh Court of Appeals filed July 24, 2006, pages 18-19.....Tab 27

TABLE OF CONTENTS - (cont.)

Appellant's Motion to Submit Documents *In Camera* filed November 13, 2006 in the Court of Appeals for the Seventh District.....Tab 28

Whiteside's Motion for Rehearing To the Court of Appeals for the Seventh District filed February 8, 2007 raising the issue of Due Process, pages 12-13.....Tab 29

Whiteside's Petition for Review to the Texas Supreme Court of March 13, 2007 raising the issue of Due Process, pages 18-19.....Tab 30

Whiteside's Motion for Rehearing of June 18, 2007 to the Texas Supreme Court raising the issue of Due Process, pages 7-9.....Tab 31

TABLE OF AUTHORITIES

CASES

Page

Axelson, Inc. v. McIlheny, 798 S.W.2d 550 (Tex. 1990).....48

TABLE OF AUTHORITIES - (cont.)

Page

Bell v. Milwaukee,
746 F.2d 1205 (CA7 1984).....23, 26, 32

Blake v. McClung,
172 U.S. 239 (1898).....25

Blumberg v. Berg,
No. 2-04-138-CV 2005 WL 1047592
(Tex. App. – Ft. Worth 2006, no pet.).....35

Boddie v. Connecticut,
401 U.S. 371 (1971).....26

Brozo v. Shearson Lehman Hutton, Inc.,
865 S.W.2d 509 (Tex. App. –
Corpus Christi,1993.....36

Bounds v. Smith,
430 U.S. 817, 97 S.Ct. 1491,
52 L.Ed.2d (1977).....30

California Motor Transport Co. v. Trucking Unlimited,
404 U.S. 508 (1972).....25

Chambers v. Baltimore & Ohio R. Co.,
207 U.S. 142, 28 S.Ct. 34, 52 L.Ed.
143 (1907).....25, 27

TABLE OF AUTHORITIES - (cont.)

Page

Christopher v. Harbury,
536 U.S. 408 (2002).....22

Crowder v. Sinyard,
884 F.2d 804 (5th Cir. 1989).....27, 33, 34

Foster v. Lake Jackson,
28 F.3d 425 (CA5 1994).....23, 26

Germany v. Vance,
673 F.Supp. 1143 (D.Mass. 1987).....32

Harbison-Fischer Mfg. Co., Inc.,
v. Mohawk Data Sciences Corp.,
823 S.W.2d 679 (Tex. App. –
Fort Worth, 1991).....36

Howland v. Kilquist,
833 F.2d 639 (7th Cir. 1987).....33

Bill Johnson's Restaurants, Inc. v. NLRB,
461 U.S. 731 (1983).....25

Karaha Bodas Co., L.L.C. v. Perusahaan
Pertambangan Minyak Dan Gas
Bumi Negara,
364 F.3d 274 (5th Cir. 2004), *cert. denied,*
543 U.S. 917 (2004).....19, 20, 35, 36, 47

TABLE OF AUTHORITIES - (cont.)

Page

Mewbourne Oil Co. v. Blackburn,
793 S.W.2d 735 (Tex. App. –
Amarillo 1990, orig. proceeding).....42

In Re Moody,
93 S.W.3d 928 (Tex. App. –
Amarillo 2003).....49

Moreno v. Sterling Drug, Inc.,
787 S.W.2d 348 (Tex. 1990).....35

Murry v. Giarratano,
492 U.S. 1, 11, n. 6 (1989).....25

In re Noteboom,
111 S.W.3d 794 (Tex. App. –
Fort Worth, 2003).....35

Pennsylvania v. Finley,
481 U.S. 551 (1987).....26

Robinson v. Wichita Falls & North
Texas Community Action Corp.,
507 F.2d 245 (C.A.5 Tex. 1975).....36

Ryland v. Shapiro,
708 F.2d 967 (5th Cir. 1983).....29, 31

Slaughter-House Cases,
16 Wall, 36 (1873).....25

TABLE OF AUTHORITIES - (cont.)

Page

State v. Lowry,
802 S.W.2d 669 (Tex. 1991).....48

Swekel v. River Rouge,
119 F.3d 1259 (CA6 1997).....23

Trans Chemical Ltd. v. China Nat Machinery Import and Export Corp.,
161 F.3d 314 (C.A.5 Tex., 1998).....36

Walker v. Packer,
827 S.W.2d 833 (Tex. 1992).....15, 49

Walters v. National Assn. of Radiation Survivors,
473 U.S. 305 (1985).....25

Werline v. E. Tex. Salt Water Disposal Co.,
No. 06-06-0039-CV, 2006 WL 3715907
(Tex. App. - Texarkana December 18, 2006, no pet.).....18

In re D. Wilson Const. Co.,
196 S.W.3d 774 (Tex. 2006).....18

Wolff v. McDonnell,
418 U.S. 539 (1974).....26

TABLE OF AUTHORITIES - (cont.)

Page

Whiteside v. Carr Hunt & Joy,
No. 07-06-0207-CV, 2007 WL 172028
(Tex. App. – Amarillo Jan. 23, 2007).....3

In Re Whiteside,
No. 07-06-0078-CV, 2006 WL 1519430
(Tex. App. – Amarillo June 6, 2006,
orig. proceeding).....3

In Re Whiteside,
No. 07-06-0078-CV 2006 LEXIS 5839
(Tex. App. – Amarillo June 26, 2006,
orig. proceeding).....3

TEXAS RULES & STATUTES

TEX. BUS. ORG. CODE
§ 152.002 (Vernon 2004-2005).....6
§ 152.601 (Vernon 2004-2005).....6

TEX. CIV. PRAC. REM. CODE
§ 171.050.....6, 42
§ 171.051.....6, 42
§ 171.086.....6, 39
§ 171.088.....7, 39
§ 171.088(a)(3)(A).....7, 40
§ 171.088(a)(3)(C).....7, 13, 40

TABLE OF AUTHORITIES - (cont.)

Page

TEXAS CONSTITUTION
art. I § 13.....7, 35

TEXAS GOVERNMENT CODE ANN.
§ 22.001a(3).....7
§ 22.221.....7, 49

CONSTITUTIONAL PROVISIONS

FEDERAL CONSTITUTION.
U.S. CONST. AMENDMENT V.....7, 25
U.S. CONST. AMENDMENT § XIV § 1.....7, 25

FEDERAL STATUTES

28 U.S.C. § 1257(a).....6, 7

FEDERAL ARBITRATION ACT (FAA)
9 U.S.C. §§ 1-16.....18

TABLE OF AUTHORITIES - (cont.)

Page

MISCELLANEOUS

Patricia Lee Refo,
Opening Statement The Vanishing Trial, THE JOURNAL OF THE SECTION OF LITIGATION AMERICAN BAR ASSOCIATION, Volume 30, No. 2, Winter 2004.....37

Chief Justice Wallace B. Jefferson,
The State of the Judiciary in Texas, Presented to the 80th Legislature February 20, 2007, TEXAS BAR JOURNAL, April 2007.....37

Justice Nathan L. Hect,
Jury Trials Trending Down in Texas Civil Cases, TEXAS BAR JOURNAL, October 2006.....38

The Arbitration Setting and the Tension Between Due Process, Expedited Proceedings, "Winning," and Ongoing Cooperative Relationships, Section of Labor & Employment Law, ADR in Labor & Employment Law Committee, 1999 Mid-Winter Meeting, AMERICAN BAR ASSOCIATION, February 6-10, 1999, page 9.....38

NO._____

IN THE
SUPREME COURT OF THE UNITED STATES

_____ Term, 2007

TOM H. WHITESIDE,
Petitioner
v.
CARR, HUNT & JOY, L.L.P.,
DONALD M. HUNT,
LATRELLE BRIGHT JOY
AND GARY BELLAIR,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE TEXAS COURT OF APPEALS
FOR THE SEVENTH DISTRICT

PETITION FOR WRIT OF CERTIORARI

Tom H. Whiteside ("Petitioner" or "Whiteside") respectfully requests that this Court reverse the judgment of the Texas Court of Appeals for the Seventh District of Texas and

remand the case to the Court of Appeals for the Seventh District of Texas with instructions to conduct the appeal of an arbitration award in accordance with accepted standards of Due Process.

OPINIONS BELOW

On October 25, 2005 the Arbitrator, Joe H. Nagy, Sr., made his decision in favor of CHJ (Pet. App. 1).[1] The 99th District Court Trial Court denied Whiteside's Motion to Reconsider on February 2, 2006 (Pet. App. 4). The Trial Court's judgment upholding the arbitration award was signed on February 13, 2006 by the Honorable Judge William C. Sowder of the 99th District Court (Pet. App. 5). The opinion of the Court of

[1]The Appendix filed by Petitioner Tom H. Whiteside with its petition for writ of certiorari is referred to herein as "Pet. App."

Appeals in the Seventh District for the Petition for the Writ of Mandamus is reported at *In re Whiteside*, No. 07-06-0078-CV, 2006 WL 1519430 (Tex. App. – Amarillo June 6, 2006, orig. proceeding) (Pet. App. 6). The June 27, 2006 opinion of the Court of Appeals in the Seventh District in response to Whiteside's Motion for Rehearing of Petition for Writ of Mandamus is reported at No. 07-06-0078-CV 2006 LEXIS 5839 (Tex. App. – Amarillo June 26, 2006, orig. proceeding) (Pet. App. 7). The January 23, 2007 opinion in the Court of Appeals for the Seventh District on Whiteside's appeal is reported at *Whiteside v. Carr Hunt & Joy*, No. 07-06-0207-CV, 2007 WL 172028 (Tex. App. – Amarillo Jan 23, 2007) (Pet. App. 8).

The Texas Supreme Court refusal to grant Whiteside's Petition for Writ of Mandamus (Pet.

App. 9) on February 17, 2007 and denial of Motion for Rehearing (Pet. App. 10) on February 27, 2007 are both unpublished. The Texas Supreme Court denial of Whiteside's Petition for Review on June 1, 2007 (Pet. App. 11) and Whiteside's Motion for Rehearing of Petition for Review on July 27, 2007 (Pet. App. 12) are unpublished.

JURISDICTION

On February 13, 2006 the Trial Court affirmed the arbitration review and refused to order documents produced *in camera* (Pet. App. 5). On June 2, 2006 the Appeals Court for the Seventh District denied Whiteside's Petition for Writ of Mandamus (Pet. App. 6) and Motion for Rehearing on June 27, 2006 (Pet. App. 7). On January 23, 2007 the Court of Appeals for the Seventh District affirmed the Trial Court's

decision in a Memorandum Opinion (Pet. App. 8). On February 17, 2007 the Texas Supreme Court denied Whiteside's Motion to Stay Proceedings and Petition for Writ of Mandamus (Pet. App. 9). In Whiteside's Motion for Rehearing to the Texas Supreme Court filed on June 18, 2007 the issue of Due Process was raised (Pet. App. 30). On June 8, 2006 Whiteside filed his Motion for Rehearing in the Court of Appeals for the Seventh District raising the issue of Due Process (Pet. App. 25). On February 27, 2007 the Court of Appeals for the Seventh District denied Whiteside's Motion for Rehearing (Pet. App. 10). In Whiteside's Petition for Review to the Texas Supreme Court (Pet. App. 30) filed March 13, 2007 and Motion for Rehearing (Pet. App. 31) filed on June 18, 2007 the issue of Due Process was raised. The Texas Supreme Court denied Whiteside's Petition for Review on

June 1, 2007 (Pet. App. 11). The Texas Supreme Court denied Whiteside's Motion for Rehearing of the Petition for Review on July 27, 2007 (Pet. App. 12). This Court has jurisdiction under 28 U.S.C. §1254(1)(a).

RELEVANT STATUTORY PROVISIONS INVOLVED

Relevant portions of:

1. TEX. BUS. ORG. CODE

   § 152.002 (Vernon 2004-2005) (Pet. App. 13)

   § 152.601 (Vernon 2004-2005) (Pet. App. 13)

2. TEX. CIV. PRAC. REM. CODE

   § 171.050 (Pet. App. 13)

   § 171.051 (Pet. App. 13)

   § 171.086 (Pet. App. 13)

§ 171.088 (Pet. App. 13)

§ 171.088(a)(3)(A) (Pet. App. 13)

§ 171.088(a)(3)(C) (Pet. App. 13)

3. TEXAS CONSTITUTION art. I § 13 (Pet. App. 13)

4. TEXAS GOVERNMENT CODE ANN.

§ 22.001a(3) (Pet. App. 13)

§ 22.221 (Pet. App. 13)

5. FEDERAL CONSTITUTION

U.S. CONSTIT. AMENDMENT V (Pet. App. 13)

U.S. CONSTIT. AMENDMENT XIV § 1 (Pet. App. 13)

6.. FEDERAL STATUTE, 28 U.S.C. § 1257(a) (Pet. App. 13).

STATEMENT OF THE CASE

A. Factual Background

On March 1, 1995 Whiteside signed a partnership agreement contract with CHJ (Pet. App. 14). Prior to October 31, 2000 CHJ began negotiations, without the knowledge of Whiteside, with Mullin Hoard & Brown, L.L.P. (hereinafter MHB) (Pet. App. 15). On request from CHJ, Whiteside tendered his resignation on October 31, 2000 (Pet. App. 15). On November 1, 2000 Hunt and Joy joined MHB as partners and Bellair as an employee (Pet. App. 16). On October 6, 2004 Whiteside filed suit on the partnership agreement for failure to pay amounts owed under Paragraph 18 (Pet . App. 14). On January 20, 2005 (Pet. App. 24, Ex. F) and March 14, 2005 (Pet. App. 23, Ex. A) Whiteside requested documents from CHJ regarding its dealings with MHB in 2000. (Pet.

App. 23, and Pet. App. 24). CHJ refused to provide the requested documents on January 21, 2005 (Pet. App. 24, Ex. F), March 2005 (Pet. App. 23, Ex. C) and March 22, 2005 (Pet. App. 23, Ex. B). Arbitration was held on September 27, 2005 with Joe H. Nagy, Sr. (hereinafter Nagy) as arbitrator under an agreement drafted and signed that day which provided pertinently: 1) "After November 1, 2000, Tom Whiteside was not paid pursuant to the said Paragraph, but was paid his participation percentage of the account receivables actually collected less his proportionate part of the expenses;" 2) "The parties agree that no evidence other than the contract will be considered at this hearing and the arbitrator will render a decision as a matter of law" (Pet. App. 16). The oral stipulations were as to the partnership agreement

signed on March 1, 1995 and that on November 1, 2000 Hunt, Joy and Bellair joined MHB.

On September 28, 2005 Whiteside submitted his Arbitration Brief and Letter Supplement to Arbitration Brief (Pet. App. 17) stating pertinently "breach of contract, has been admitted by CHJ ... With no evidence offered by CHJ, there is no excuse or defense ..." and "While CHJ would like the Court to consider this defense, it vehemently refuses to disclose the documents which reflect the dealings with Mullin Hoard & Brown, L.L.P."

CHJ submitted their Brief on October 5, 2005 stating pertinently: "[D]issolution occurred pursuant to Paragraph 22a at the end of the day on 31 October 2000 ... [T]hat was both a dissolution by majority vote and by operation of law."

Gary Bellair also filed his Post Submission Position Statement on October 5, 2005 stating

pertinently "On 31 October 2000, Whiteside withdrew and Hunt, Joy and Bellair ceased to practice law as members of the Carr-Hunt-Joy Partnership."

On October 25, 2005 Nagy issued his opinion finding no breach stating "[I]t was stipulated at the Arbitration hearing on September 27, 2005 that Tom Whiteside, Donald M. Hunt, Latrelle Bright Joy and Gary Bellair had terminated their relationship with Carr, Hunt & Joy, L.L.P. as of October 31, 2000. ... No other evidence or testimony was taken at the hearing" (Pet. App. 1).

Whiteside replied to Nagy on October 28, 2005 (Pet. App. 18) stating pertinently:

> There is no evidence that 1) Hunt, Joy and Bellair ceased practicing law as members of CHJ on 31 October 2000; 2)

dissolution occurred at the end of the day on 31 October 2000. (Not content with 1 November 2000 as the start of business with MHB, CHJ and Bellair move back their "dissolution by majority vote" to 31 October 2000 to support their theories of contemporaneous withdrawal with no deemed redemption of Whiteside's interest and no "remaining" partners to collect and pay Whiteside under Paragraph 18); 3) on 31 October 2000 there was a dissolution by majority vote and operation of law; 4) CHJ began the process of winding up on 1 November 2000.

On November 4, 2005 CHJ responded pertinently stating "...while no formal meeting

was held or a vote taken, Hunt, Joy and Bellair voted with their feet ..." (Pet. App. 19).

On November 18, 2005 Nagy denied Whiteside's Motion to Modify or Correct the Award. (Pet. App. 2).

On November 21, 2005 Whiteside wrote to Nagy (Pet. App. 20) arguing "[I]t is your duty as an arbitrator under the Texas Arbitration Act to "hear all the evidence material to the controversy." §171.088(a)(3)(C).

On December 1, 2005 Nagy denied Whiteside's claim. (Pet. App. 3).

On December 2, 2005 Whiteside wrote Nagy (Pet. App. 21) stating pertinently: "[W]ithout further factual evidence you cannot decide either occurred and your only decision could be there was a breach. You can only determine there was a dissolution, and therefore no breach, by examining

CHJ's records of dealings with Mullin Hoard & Brown."

On February 2, 2006 the Trial Court denied Whiteside's Motion to Reconsider. (Pet. App. 4).

HOW THE ISSUES WERE DECIDED BELOW

The Trial Court signed a Judgment on February 13, 2006 (Pet. App. 5) in favor of CHJ which denied Whiteside's Motion to Submit Documents *In Camera* (Pet. App. 23) and Whiteside's Motion to Vacate (Pet. App. 22).

On June 2, 2006 the Court of Appeals for the Seventh District in a per curiam Memorandum Opinion by Quinn, C.J., Campbell, J. and Francis, J., Seventh Court of Appeals, sitting by assignment, denied Whiteside's Petition

for Writ of Mandamus (Pet. App. 6) stating pertinently:

> Without expressing an opinion on the merits of either contention, we are unpersuaded the absence of the requested documents inhibited the presentation of those arguments to the trial court or in an appeal. Both the record of the evidence considered by the arbitrator and his refusal to consider evidence of dealings between the other CHJ partners and MHB can be established without the documents relator seeks. *See Walker*, 827 S.W.2d at 843-44 (appeal remedy may be inadequate when discovery denied and reviewing court is unable to evaluate effect of error on the record before it).

> Relator has failed to show the documents are necessary to his presentation of either of the asserted grounds for vacation of the arbitration award.

On June 27, 2006 the Court of Appeals for the Seventh District denied Whiteside's Motion for Rehearing of Mandamus (Pet. App. 7) stated pertinently:

> The supplemental motion alleged the CHJ partnership obtained the arbitration award by misrepresenting to the arbitrator whether there was a dissolution of CHJ or merger with the MHB partnership. The Motion did not challenge the validity of the September 27, 2005 agreement and

stipulation limiting the evidence the arbitrator could consider.

The January 23, 2007 Memorandum Opinion for the Court of the Appeals for the Seventh District of Texas (Pet. App. 8) stated pertinently:

> [2]As we later discuss, Whiteside contends the circumstances raise the issue whether this action constitutes a merger of the partnerships or acts of the former partners individually. The record indicates Whiteside's former partners occupied the same offices and used the same office staff and equipment as they used in the CHJ partnership.
>
> ...

[3]Both parties also cite Texas and federal court cases, applying the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16. State and federal jurisprudence in this area is largely consistent and the well-developed federal jurisprudence is instructive. *See In re D. Wilson Const. Co.,* 196 S.W.3d 774, 780 (Tex. 2006) (state and federal acts can apply simultaneously).

...

An appellate court's review of the trial court's confirmation of the arbitration award is de novo. *Werline v. E. Tex. Salt Water Disposal Co.,* No. 06-06-0039-CV, 2006 WL 3715907 (Tex. App. –

Texarkana December 18, 2006, no pet.) (applying Texas common law).

...

In view of the parties' express agreement limiting the evidence to be considered by the arbitrator, the trial court did not err in declining to vacate the arbitrator's award on the grounds he exceeded his powers or refused to hear material evidence by giving effect to the agreement.

...

Assuming, without deciding, that the test for fraud set out in *Karaha Bodas* is applicable under the TGAA,[5] the record here does not establish the elements of that test. Like *Karaha Bodas,* the conduct

Whiteside challenges was known before the arbitration hearing, precluding him from satisfying the second element. Far from pursuing his outstanding requests at the arbitration hearing, Whiteside entered into the submission agreement, including its express provision limiting the evidence to be considered. The agreement negates his assertion that appellees "wrongly" withheld the records. *See Karaha Bodas,* 364 F.3d at 304 (noting representation at conclusion of arbitration hearing that record had been 'fully made").

Whiteside's contention the arbitrator had no evidence on which to decide

whether the partners' actions constituted a dissolution or a merger with MHB without examination of CHJ's records of "dealings" with MHB is, at bottom, an attack of the sufficiency of the evidence on which the arbitrator based his decision.

...

Whiteside's second issue assigns error to the trial court's failure to order production of documents concerning dealings between CHJ and MHB for *in camera* review.

...

Here, the trial court had before it the unchallenged submission agreement limiting the evidence to be considered by the arbitrator. We

hold the trial court did not err in declining Whiteside's motion to compel production of documents for *in camera* review and overrule his second issue.

REASONS TO GRANT THE WRIT

1. Due Process denial of access.

a. Applicable Law

The June 20, 2002 opinion of this Court in *Christopher v. Harbury,* 536 U.S. 408 (2002) states pertinently:

...

> The second category covers claims not in aid of a class of suits yet to be litigated, but of specific cases that cannot be tried (or tried with all material evidence), no matter what

official action may be in the future.[9] The official acts claimed to have denied access may allegedly have caused the loss or inadequate settlement of a meritorious case, *e.g.*, *Foster v. Lake Jackson,* 28 F.3d 425, 429 (CA5 1994); *Bell v. Milwaukee,* 746 F.2d 1205, 1261 (CA7 1984) ("[T]he cover-up and resistance of the investigating police officers rendered how [the plaintiff's] right to seek redress"), the loss of an opportunity to sue, *e.g., Swekel v. River Rouge,* 119 F.3d 1259, 1261 (CA6 1997) (police cover-up extended throughout "time to file suit ... under ... statute of limitations"), or the loss of an opportunity to seek some particular

> order of relief, as Harbury alleges here. These cases do not look forward to a class of future litigation, but backward to a time when specific litigation ended poorly,[10] or could not have commenced, or could have produced a remedy subsequently unobtainable.[11] The ultimate object of these sorts of access claims, then, is not the judgment in a further lawsuit, but simply the judgment in the access claim itself, in providing relief obtainable in no other suit in the future.
>
> ...

The Supreme Court further explains:

> Decisions of this Court have grounded the right of access to courts

in the Article IV Privileges and Immunities Clause, *Chambers v. Baltimore & Ohio R. Co.,* 207 U.S. 142, 148 (1907); *Blake v. McClung,* 172 U.S. 239, 249 (1898); *Slaughter-House Cases,* 16 Wall, 36, 79 (1873), the First Amendment Petition Clause, *Bill Johnson's Restaurants, Inc. v. NLRB,* 461 U.S. 731, 741 (1983); *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508, 513 (1972), the Fifth Amendment Due Process Clause, *Murry v. Giarratano,* 492 U.S. 1, 11, n. 6 (1989) (plurality opinion); *Walters v. National Assn. of Radiation Survivors,* 473 U.S. 305, 335 (1985); and the Fourteenth Amendment Equal Protection,

Pennsylvania v. Finley, 481 U.S. 551, 557 (1987), and Due Process Clauses, *Wolff v. McDonnell*, 418 U.S. 539, 576 (1974); *Boddie v. Connecticut*, 401 U.S. 371, 380-381 (1971).

Finally this Court explains that:

> It may be case that an underlying action has already been tried to an inadequate result due to missing or fabricated evidence in an official cover-up, see, *e.g.*, *Foster*, 28 F.3d, at 427; *Bell*, 746 F.2d, at 1223, or the claim may still be timely and subject to trial, but for a different remedy than the one sought under the access claim, or against different defendants.

The Court of Appeals for the Fifth Circuit in *Crowder v. Sinyard*, 884 F.2d 804 (5th Cir. 1989) stated pertinently:

> Although judicial recognition of the constitutional right of access to the courts occurred long ago,[FN7] the current contours of the right can best be described as nebulous. If for no other reason, this is because much of the development of the right has occurred in the prison context, where state officials have the capability of exercising both direct and indirect control over the litigation activities of incarcerated individuals.
>
> ...
>
> FN7. The origins of the right can be traced to *Chambers v.*

Baltimore & Ohio R.R., 207 U.S. 142, 148, 28 S.Ct. 34, 35, 52 L.Ed. 143 (1907):

> The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship ...
>
> Although this discussion of the right took place in the context of the privileges and immunities clause of article IV, section 2 of the Constitution, the right has also been said to

> derive from the due process clauses of the fifth and fourteenth amendments and the right of petition found in the first amendment. *See generally Ryland v. Shapiro,* 708 F.2d 967, 971-72 (5th Cir. 1983) (citing cases).
>
> ...
>
> As we have pointed out, however, our cases also stand for the proposition that mere formal right of access to the courts does not pass constitutional muster. Courts have required that the access be 'adequate, effective, and meaningful.' *Ryland v. Shapiro,* 708 F.2d at 972 (quoting *Bounds v. Smith,*

430 U.S. 817, 822, 97 S.Ct. 1491, 1495, 52 L.Ed.2d 72 (1977)). Id. at 811.

...

In the world of litigation outside prison walls, these cases are of little assistance. Unlike prisoners, ordinary individuals do not find any physical barriers between them and the courts. To file a complaint or legal paper, they need merely travel to the courthouse or even just the nearest mailbox; to obtain legal advise, they need only travel to a lawyer's office or the nearest library, or pick up the telephone. If the constitutional right of access has any sweep outside the prison context, therefore, it must be based upon a more nuanced

interpretation of the requirement that such access be "adequate, effective, and meaningful."

...

> FN8. The Ryland court also surmised without citation to authority, that "any interference with a substantive constitutional right, such as the right of access to the courts, may by itself amount to a constitutional deprivation (unless reasonably justified by a countervailing state interest)." 708 F2d at 975. Id. at 811-812.

...

FN9. Other courts considering official cover-ups similarly have held that a showing of substantial prejudice to the plaintiff's rights is required. *See Bell v. City of Milwaukee*, 746 F.2d 1205, 1260-61 (7th Cir. 1984).

...

Germany v. Vance, 673 F.Supp. 1143, 1149 (D.Mass. 1987) (state officials who failed to inform then-incarcerated minor that key witness had recanted testimony may be sued for violating her right of access to the courts, insofar as "failure to disclose facts which are

essential to a incarcerated individual's claim for relief may be more effective in denying access to the courts than destroying court papers or limiting access to the mail") (footnote omitted, *aff'd in part, rev'd in part*, 868 F.2d 9 (1st Cir. 1989). *Cf. Howland v. Kilquist*, 833 F.2d 639, 642 (7th Cir. 1987) (in the context of *pro se* prisoner litigation, stating that "some showing of detriment caused by the challenged conduct must be made in order to succeed on a claim alleging a deprivation of the right to meaningful access

to the courts" (citations omitted)). Id. at 813.

...

The right of access to the courts is what may be described as a facilitative right. It is designed to ensure that a citizen has the opportunity to exercise his or her legal rights to present a cognizable claim to the appropriate court and, if that claim is meritorious, to have the court make a determination to that effect and order the appropriate relief.

...

Id. at 814.

b. Application to Arbitration.

No federal cases have been found which applied the "right of access" or Due Process to

state courts of appeal's proceedings in arbitration. A Texas court has applied the Texas Constitution's "Open Courts"[2] provision to arbitration, but determined the same was not violated. *Blumberg v. Berg*, No. 2-04-138-CV 2005 WL 1047592 (Tex. App. – Fort Worth 2006, no pet.). Often Texas state and federal courts have applied Due Process to arbitration. *See In re Noteboom*, 111 S.W.3d 794 (Tex. App. – Fort Worth, 2003); *Karaha Bodas Company,*

---

[2]In *Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348, 355 (Tex. 1990) explained the "Open Courts" provision as follows:

In order to establish an "open courts" violation, a litigant must satisfy a two-part test: first, he must show that he has a well-recognized common-law cause of action that is being restricted; and second, he must show that the restriction is unreasonable or arbitrary when balanced against the purpose and basis of the statute.

L.L.C. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 364 F.3d 274 (5th Cir. 2004), cert. denied, 543 U.S. 917 (2004); *Trans Chemical Ltd. v. China Nat Machinery Import and Export Corp.*, 161 F.3d 314 (C.A.5 Tex., 1998); *Brozo v. Shearson Lehman Hutton, Inc.*, 865 S.W.2d 509 (Tex. App. – Corpus Christi, 1993); *Harbison-Fischer Mfg. Co., Inc., v Mohawk Data Sciences Corp.*, 823 S.W.2d 679 (Tex. App. – Fort Worth, 1991); *Robison v. Wichita Falls & North Texas Community Action Corp.*, 507 F.2d 245 (C.A.5 Tex., 1975).

The Fifth Circuit in *Karaha Bodas* considered Due Process claims in arbitration under New York Convention, but found no violation. Significantly, the Court considered that "refusal to grant continuance and additional discovery did not 'so effect the rights of

[Pertambangan] that it may be said that [it] was deprived of a fair hearing.'" Id. at 302. This is, of course, the case on which the Court of Appeals relied in holding that given the submission agreement Whiteside could not complain since he had represented, like Pertambangan, that the record was "fully made". See opinion page 20, *supra.*

c. The Vanishing Trial

Several commentators have acknowledged the decline in trials and have postulated that arbitration may play a significant role. See Patricia Lee Refo, *Opening Statement The Vanishing Trial,* THE JOURNAL OF THE SECTION OF LITIGATION AMERICAN BAR ASSOCIATION, Volume 30, No. 2, Winter 2004; Chief Justice Wallace B. Jefferson, *The State of the Judiciary in Texas, Presented to the 80th Legislature February 20,*

2007, TEXAS BAR JOURNAL, April 2007; Justice Nathan L. Hect, *Jury Trials Trending Down in Texas Civil Cases*, TEXAS BAR JOURNAL, October 2006. Since arbitration decisions are unpublished, the question remains if Due Process rights are being protected. In labor arbitration the "Due Process Protocol" has been employed to ensure "effective discovery ... the key to true justice in arbitration cases." See *The Arbitration Setting and the Tension Between Due Process, Expedited Proceedings, "Winning," and Ongoing Cooperative Relationships*, Section of Labor & Employment Law, ADR in Labor & Employment Law Committee, 1999 Mid-Winter Meeting, AMERICAN BAR ASSOCIATION, February 6-10, 1999, page 9. A necessity exists for this Court to examine the extent of Due Process protection in arbitration.

2. The Court of the Appeals denial of Due Process.

The Court of Appeals' overly restrictive review of Whiteside's arbitrated breach of contract claim under TRCP § 171.086 (Pet. App. 13) and § 171.088 (Pet. App. 13) and refusal to order documents submitted *in camera* are unreasonable or arbitrary when balanced against the purposes of arbitration. While arbitration is viewed as a valid, expeditious alternative to litigation, an overly restrictive effect on common law contract claims cannot stand. Here, the Court's method of analysis, despite its *de novo* review, upholds an award unsupported by evidence and permits no review of admittedly withheld evidence which could also potentially reveal the claims to be fraudulent and not in good faith. Further, the Court ignores the plain language of the

submission agreement in finding no breach and ignores the second arbitration phase which allows for evidence of CHJ's lack of good faith.

Finally, the Court makes a curious and unfounded finding that Whiteside knew of CHJ's claimed dissolution before arbitration. The laudable goals of speedy and economical resolution of disputes do not overcome the right of the participants to have "remedy by due course of law." Due course of law is not achieved when an award is affirmed when contrary to the contract and secured by unsubstantiated, unreviewed representations.

The award must be vacated for Nagy's refusal to consider evidence material to the controversy which denied Whiteside a fair hearing. CPRC § 171.088(a)(3)(C) (Pet. App. 13) and § 171.088(a)(3)(A). (Pet. App. 13). Nagy's

ruling of no breach adopted CHJ's undisclosed theory of simultaneous dissolution with Whiteside's withdrawal. However, without considering CHJ's evidence of dealings with MHB prior to November 1, 2000, the arbitrator could not determine as a matter of law whether there was either a merger or dissolution. As noted above, the finding of dissolution is unfounded. To exclude the only evidence which would support or defeat the finding of dissolution necessarily deprives Whiteside of a fair hearing.

In its' opinion on Whiteside's Motion for Rehearing of the Petition for Writ of Mandamus, the Court of Appeals for the Seventh District (Pet. App. 7) questioned why Whiteside's motion did not challenge the validity of the September 27, 2005 submission agreement (Pet. App. 16) limiting the evidence the arbitrator could

consider. In fact the arbitrator is not limited to what the parties agree or what information he is given. See CPRC § 171.050 (Pet. App. 13). (Depositions); § 171.051. (Subpoenas) (Pet. App. 13). If the arbitrator felt he had insufficient information to render a decision, then he "was empowered to cause the discovery necessary to the resolution of the issues before (him)". See *Mewbourne Oil Co. v. Blackburn*, 793 S.W.2d 735, 737 (Tex. App. - Amarillo 1990, orig. proceeding). Here, however, he adopted CHJ's theory without any supporting evidence, ignored the overwhelming evidence which disproved the theory and refused to order the production of any documents which would support the same explaining (wrongly) that he was limited to the parties' agreement. Thus, the arbitrator deprived Whiteside of a fair hearing in not ordering

evidence produced which would have conclusively determined the issues before him.

The Court of Appeals wrongly held that "the conduct Whiteside challenged was clearly known by Whiteside before the arbitration hearing" and the submission agreement negated Whiteside's "assertion that the Appellees wrongly withheld the MHB records" thus overruling his claim of undue means. While Whiteside did agree to submit the issue of breach of contract on limited facts, Whiteside did not agree to CHJ's potentially fraudulent assertion of dissolution. Contrary to the Court of Appeals' contention as stated above, Whiteside was unaware that CHJ and Bellair were contending a "dissolution" occurred until after the cause was submitted; CHJ's and Bellair's confidential position statements were not provided to Whiteside before

arbitration. The confidential parties' statements were provided by Nagy to the Court of Appeals in a sealed envelope. (See CR: Sealed Records). The dissolution arguments were actually only disclosed to Whiteside after submission in their October 5, 2005 Brief and Post Submission Statement.

As soon as Whiteside was aware of CHJ's and Bellair's contention of dissolution, he urged Nagy "during the arbitration" to secure and examine the MHB records. (See Pet. App. 17). He then sought the Trial Court, the Court of Appeals and the Texas Supreme Court to order the same submitted *in camera* without success. However, Whiteside only presumes the documents support his contentions of undue means and lack of good faith. This is not, as the Court of Appeals holds, simply an attack on the "sufficiency of the

evidence," but whether CHJ and Bellair wrongly withheld their dealings and misrepresented whether dissolution occurred to wrongfully influence the arbitrator and procure the award by undue means. The fact that CHJ's lack of good faith and potential misrepresentations were successful is not a defense to the Court's ordering an examination of the documents by the Trial Court.

Moreover, CHJ's and Bellair's arguments in their briefs before the Court of Appeals support Whiteside's request. CHJ argued the case should be affirmed since "Whiteside, however, never proved that any party ever withheld any document. ... Whiteside only speculates about evidence, speculates about his entitlement and speculates how the evidence might help him." (See CHJ's Brief to the Court of Appeals (pages 19-20).

Further, Bellair's Brief to the Court of Appeals (pages 1, 4, 11-13) argued the case should be affirmed because " ...Whiteside failed to prove all the elements of fraud necessary to justify the rendition of an order vacating the arbitration award."

Thus, CHJ and Bellair argue a lack of evidence of undue means while lowering "an iron curtain of silence" over the very evidence which would decide the issue. The MHB records must be examined to determine whether CHJ's and Bellair's representations of dissolution to the arbitrator (who accepted the statement as fact), the Trial Court and the Court of Appeals is true.

By stating "the Court had before it the unchallenged submission agreement limiting the evidence to be considered by the arbitrator," the Court of Appeals attempts to relieve itself of

any analysis of the lower Court's decision. Whiteside had not agreed to exclude evidence of CHJ's dealings with MHB in the arbitration as the submission agreement provided for a damages phase and a determination of "any remaining claim."[3] Unlike the losing party in *Karaha Bodas, supra,* Whiteside showed the CHJ records he sought from the arbitrator, District Court, Court of Appeals and Texas Supreme Court would have created fact issues material to determining whether he received a "fundamentally fair hearing." Id. 364 F.3d at 305. An award rendered without a review of the

[3]If the arbitrator should decide that the ... partners are liable to Whiteside ... then the partners on each side agree to submit a calculation of the amount, if any, owed ..." and "then the arbitrator will determine any remaining claims, if any." (Pet. App. 16).

undisclosed documents is fundamentally unfair.

Moreover, the proper abuse of discretion standard here is whether an inspection of the documents was necessary. Where, as here, CHJ contended that the documents were not discoverable given their lack of relevance and privacy[4], it is an abuse of discretion to rule without first examining the documents. See *State v. Lowery,* 802 S.W.2d 659, 774 (Tex. 1971). The documents themselves are the only evidence that supports the claim of privilege and therefore must be examined. See *Axelson v. McIlheny,* 798 S.W.2d 550, 553 (Tex. 1990). Moreover, the Court

[4]If you want to see them I will be happy to produce them, but they are not relevant to this because they are about my individual law practice and joining another firm. (See RR at 30).

"cannot evaluate the effect of the Trial Court's error" without ordering the Trial Court to make the documents part of the record. See *Walker v. Packer,* 827 S.W.2d 833, 843 (Tex. 1992). Moreover, the Court of Appeals abused its authority in not exercising its mandamus power under TEX. GOV. CODE ANN. § 22.221 (Pet. App. 13) to protect its own jurisdiction on a pending appeal when "the conduct complained of ... interferes with our ability to resolve a matter pending before us."[5] Here, the documents implicate a pending appeal and their absence interferes with the Court of Appeals' ability to resolve the vacatur issues before it.

---

[5]See *re Moody,* 93 S.W.3d 928 (Tex. App. – Amarillo 2003) (orig. proceeding).

CONCLUSION

The Court should grant certiorari and schedule this case for briefing and oral argument.

Respectfully submitted,

Tom H. Whiteside

WHITESIDE LAWFIRM
1001 Texas Avenue
Lubbock, Texas 79401
(806) 687-9009
Attorney for Petitioner

APPENDIX

COURT OPINIONS

Arbitration decision signed
October 25, 2005.....Tab 1

Nagy denies Whiteside's Motion to
Modify or Correct the Award on
November 18, 2005.....Tab 2

On December 1, 2005 Nagy
denies Whiteside's request
of October 28, 2005 to rule that
the Partnership Agreement had
been breached and Whiteside's
request for documents showing
CHJ's dealings with MHB.....Tab 3

Trial Court denying Motion to
Reconsider dated February 2, 2006.....Tab 4

Trial Court Judgment signs Order
Denying Plaintiff's Motion to
Vacate Arbitration Award,
Denying Plaintiff's Motion to
Submit Documents *In Camera*
and Confirming the Arbitration
Award signed February 13, 2006.....Tab 5

Court of Appeals for the Seventh
District's Memorandum Opinion
denying Whiteside's Petition for
Writ of Mandamus on June 2, 2006.....Tab 6

Court of Appeals for the Seventh
District's Memorandum Opinion
on Motion for Rehearing of
Mandamus dated June 27, 2006.....Tab 7

Court of Appeals for the Seventh
District's Memorandum Opinion on
arbitration award and Motion to
Compel Production of Documents
dated January 23, 2007.....Tab 8

The Texas Supreme Court denying
Whiteside's Motion to Stay and
Petition for Writ of Mandamus
on February 17, 2007.....Tab 9

The Court of Appeals for the Seventh
District denying Whiteside's Motion
for Rehearing on February 27, 2007....Tab 10

The Texas Supreme Court denying
Whiteside's Petition for Review on
June 1, 2007.....Tab 11

The Texas Supreme Court denying
Whiteside's Motion for Rehearing of
Whiteside's Petition for Review on
July 27, 2007.....Tab 12

CONSTITUTION AND STATUTES

FEDERAL CONSTITUTION

U.S. CONSTIT. AMENDMENT V.....Tab 13

U.S. CONSTIT. AMENDMENT XIV § 1.....Tab 13

FEDERAL STATUTES

28 U.S.C. § 1257(a).....Tab 13

TEX. BUS. ORG. CODE

§ 152.002 (Vernon 2004-2005)....Tab 13

§ 152.601 (Vernon 2004-2005)....Tab 13

TEX. CIV. PRAC. REM. CODE

§ 171.050.....Tab 13

§ 171.051.....Tab 13

§ 171.086 Arbitration.....Tab 13

§ 171.088.....Tab 13

§ 171.088(a)(3)(A).....Tab 13

§ 171.088(a)(3)(C).....Tab 13

TEXAS CONSTITUTION

art. I § 13.....Tab 13

TEXAS GOVERNMENT CODE ANN.

§ 22.001a(3).....Tab 13

§ 22.221.....Tab 13

IMPORTANT DOCUMENTS

CHJ Partnership Agreement signed March 1, 1995.....Tab 14

Whiteside's withdrawal letter dated and signed October 31, 2000.....Tab 15

Written arbitration stipulations dated September 27, 2005.....Tab 16

Whiteside's Letter Supplement to Arbitration Brief dated September 28, 2005.....Tab 17

Letter from Whiteside to Nagy dated October 28, 2005.....Tab 18

Letter from CHJ to Nagy dated November 4, 2005.....Tab 19

Letter from Whiteside to Nagy dated November 21, 2005.....Tab 20

Letter from Whiteside to Nagy dated December 2, 2005.....Tab 21

Motion to Vacate Arbitration Award filed January 12, 2006 in the Trial Court.....Tab 22

Plaintiff's Motion to Submit Documents *In Camera* filed January 26, 2006 in the Trial Court.....Tab 23

First Supplement to Plaintiff's Motion to Submit Documents *In Camera* filed January 26, 2006 in the Trial Court.....Tab 24

Plaintiff's Brief in Support of Motion to Vacate Arbitration Award and Motion to Submit Documents *In Camera* filed January 27, 2006.....Tab 25

Petitioner Whiteside's Motion for Rehearing of Writ of Mandamus filed June 8, 2006 in the Court of Appeals for the Seventh District.....Tab 26

Whiteside's Appellant Brief to the Court of Appeals for the Seventh Court of Appeals filed July 24, 2006, pages 18-19.....Tab 27

Appellant's Motion to Submit Documents *In Camera* filed November 13, 2006 in the Court of Appeals for the Seventh District.....Tab 28

Whiteside's Motion for Rehearing to the Court of Appeals for the Seventh District filed February 8, 2007 raising the issue of Due Process, pages 12-13.....Tab 29

Whiteside's Petition for Review
to the Texas Supreme Court of
March 13, 2007 raising the issue
of Due Process, pages 18-19.....Tab 30

Whiteside's Motion for Rehearing
of June 18, 2007 to the Texas
Supreme Court raising the issue
of Due Process, pages 7-9.....Tab 31

Supreme Court, U.S.
FILED
(2)
07-870 OCT 25 2007
OFFICE OF THE CLERK

NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

_____ Term, 2007

TOM H. WHITESIDE,
Petitioner
v.
CARR, HUNT & JOY, L.L.P., DONALD M. HUNT, LATRELLE BRIGHT JOY AND GARY BELLAIR,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF APPEALS FOR THE SEVENTH DISTRICT

PETITION FOR WRIT OF CERTIORARI APPENDIX

Tom H. Whiteside*
WHITESIDE LAW FIRM
1001 Texas Avenue, Suite 135
Lubbock, Texas 79401
Phone: (806) 687-9009
Facsimile: (806) 687-9011
* Counsel of Record, Member Supreme Court Bar

October 25, 2005

Tom H. Whiteside
P.O. Box 2825
Lubbock, Texas 79408-2825

Don M. Hunt
P.O. Box 2528
Lubbock, Texas 79408-2528

Grady Terrill
1500 Broadway, Suite 400
Lubbock, Texas 79401

Re: Cause No. 2004-528,060; Whiteside v. CHJ;

In Arbitration from the 99th District Court of

Lubbock County, Texas

Dear Counsel:

On September 27, 2005, the parties in the above-styled and numbered cause, executed an Arbitration Agreement. Said Arbitration Agreement has also been executed and approved by their attorneys of record, and a copy of same is

attached hereto as Exhibit "A" and incorporated herein as if copied in full in this letter.

It is stipulated at the Arbitration hearing on September 27, 2005, that Tom Whiteside, Donald M. Hunt, Latrelle Bright Joy and Gary Bellair had terminated their relationship with Carr, Hunt & Joy, L.L.P. as of October 31, 2000. The parties also stipulated as to the Partnership Agreement, a copy of which is marked as Exhibit "B" in Plaintiff's Volume of Exhibits. No other evidence or testimony was taken at the hearing.

After due consideration of the Partnership Agreement, the Arbitration Agreement and the stipulations of the parties, it is the opinion of the Arbitrator, and the Arbitrator finds that Carr, Hunt & Joy, L.L.P. and Donald M. Hunt, Latrelle Bright Joy and Gary Bellair did not breach the Partnership Agreement in question.

DATED: October 25th, 2005.

Respectfully submitted,

/s/ Joe H. Nagy

Joe H. Nagy, Arbitrator

CAUSE 2004-528-060

TOM H. WHITESIDE *Plaintiff*	§	IN THE 99TH DISTRICT COURT
v.	§	
CARR, HUNT & JOY, DONALD M. HUNT, LATRELLE BRIGHT JOY, and GARY BELLAIR *Defendants*	§	OF LUBBOCK COUNTY, TEXAS

ORDER DENYING PLAINTIFF'S MOTION TO VACATE ARBITRATION AWARD, DENYING PLAINTIFF'S MOTION TO SUBMIT DOCUMENTS *IN CAMERA* AND CONFIRMING THE ARBTRATION AWARD

On the 27th day of January 2006, the Court considered Plaintiff's Motion to Vacate Arbitration Award and Plaintiff's Motion to Submit Documents In Camera. Pursuant to timely notice, Plaintiff, Tom H. Whiteside, appeared in person, Defendant, Gary M. Bellair, appeared in person and by his attorney,

Defendant, Donald M. Hunt, appeared in person and Defendants, Carr, Hunt & Joy, L.L.P. and Latrelle Bright Joy appeared by their attorney. Plaintiff moved to vacate the arbitration award on three grounds; (1) TEX. CIV. PRAC. & REM. CODE ANN. § 171.088(a)(1) (Vernon 2005) (undue means); (2) TEX. CIV. PRAC. & REM. CODE ANN. art § 171.088(a)(3)(A) (Vernon 2005) (exceeded powers); and (3) TEX. CIV. PRAC. & REM. CODE ANN. § 171.088(a)(3)(C) (Vernon 2005) (refusal of evidence). The parties presented no evidence and instead orally argued their respective positions to the Court. After having considered the award of the arbitrator, the stipulations before the arbitrator and the arguments of the parties, this Court holds that Plaintiff's Motion to Vacate Arbitration Award and Plaintiff's Motion to Submit Documents In Camera should be denied.

IT IS THEREFORE ORDERED that:

(1) Plaintiff's Motion to Vacate the Arbitration Award is denied, and

(2) Plaintiff's Motion to Submit Documents *In Camera* is denied.

It next appearing the motion to vacate has been denied and that the arbitrator denied Plaintiff's Motion to Modify or Correct the Award and no Motion to Modify or correct is pending, the Court concludes that the award of the arbitrator should be confirmed pursuant to TEX. CIV. PRAC. & REM. CODE ANN. § 171.088© (Vernon 2005)

IT IS THEREFORE ORDERD that:

(1) the award of the arbitrator, Joe H. Nagy, is confirmed;

(2) Plaintiff, Tom H. Whiteside, take nothing against Defendants, Carr, Hunt & Joy, L.L.P. Donald M Hunt,

Latrelle Bright Joy and Gary Bellair; and

(3) Defendants recovered their cost of court against Plaintiff, for which let execution issue.

All relief not granted is denied. This order determines all issues between the parties and according is a final judgment and subject to appeal.

Signed on 13th day of February 2006.

/s/ William C. Sowder
Judge Presiding

NO. 07-06-0207-CV

IN THE COURT OF APPEALS

FOR THE SEVENTH DISTRICT OF TEXAS

AT AMARILLO

PANEL D

JANUARY 23, 2007

TOM H. WHITESIDE, APPELLANT

V.

CARR, HUNT & JOY, L.L.P. DONALD M. HUNT, LATRELLE BRIGHT JOY AND GARY BELLAIR

FROM THE 99TH DISTRICT COURT OF LUBBOCK COUNTY;

NO. 2004-528,060; HONORABLE WILLIAM SOWDER, JUDGE

Before QUINN, C.J. and CAMPBELL and PIRTLE, JJ.

MEMORANDUM OPINION

Appellant Tom H. Whiteside appeals a final order confirming an arbitration award and denying his motion to compel production of documents in a dispute over the method used to calculate payments due Whiteside from the law partnership of which he formerly was a member. Appellees are the former partnership, Carr Hunt & Joy, L.L.P. (CHJ) and three of its former members, Donald M. Hunt, Latrell Bright Joy and Gary Bellair. We affirm the trial court's order.

FACTS[1]

By a letter dated October 31, 2000, Whiteside withdrew from CHJ after learning of his partners' plans to join another firm of Mulin Hoard Brown (MHB).[2] Whiteside brought suit in October 2004 against the CHJ partnership and his former partners

---

[1]Our recitation of the facts and procedural background of the case comes largely from this Court's memorandum opinion denying a petition for writ of mandamus brought by Whiteside, *In re Whiteside*, No. 07-06-0078-CV, 2006 WL 1519430 (Tex.App.-Amarillo June 6, 2006, orig. proceeding).

[2]As we later discuss, Whiteside contends the circumstances raise the issue whether this action constituted a merger of the partnerships or acts of the former partners individually. The record indicates Whiteside's former partners occupied the same offices and used the same office staff and equipment as they used in the CHJ partnership.

individually for breach of the partnership agreement. The dispute centers around his claim that the partnership agreement entitles him to a greater payment for CHJ's collected accounts receivable than he has received.

By a provision of the partnership agreement, the CHJ partners agreed to submit any dispute arising from the conduct of the affairs of the partnership to binding arbitration pursuant to the Texas General Arbitration Act (TGAA). Citing the arbitration provision, Hunt and Joy sought to stay the litigation
and compel arbitration. The trial court granted that request in an agreed order directing the parties to arbitrate "the partnership payment claim asserted by Whiteside[.]"

The parties selected an arbitrator who conducted an arbitration hearing in September 2005. At that hearing the parties entered a written agreement and stipulation to which we will refer as the "submission agreement," to distinguish it from the partnership agreement. The submission agreement recited that, after November 1, 2000, Whiteside had not been paid pursuant to a particular paragraph of the partnership agreement but had instead been paid his "participation percentage" of the firms's accounts receivable actually collected less his proportionate part of the expenses. The submission agreement provided that the parties agreed to submit to the named arbitrator "the issue of liability, if any, for breach of contract of the agreement of general partnership pursuant to

[the particular paragraph] based on a proper construction of the agreement of general partnership, the paragraph in issue and the applicable law, jurisdiction and affirmative defenses." Significantly, the submission agreement further provided, "The parties agree that no evidence other than the contract will be considered at this hearing and the arbitrator will render a decision as a matter of law."

At the hearing, the parties further stipulated to the authenticity of a copy of the partnership agreement and that Hunt, Joy and Bellair began practicing with MHB on November 1, 2000. The parties subsequently submitted briefs supporting their respective position. In October 2005 the arbitrator issued his decision finding there was no breach of the partnership agreement. Through

correspondence Whiteside urged reconsideration on the basis that determination of whether the agreement had been breached required consideration of evidence concerning any negotiations between MHB and his former partners. Specifically, he argued the evidence would show a merger between the CHJ partnership and MHB, supporting his view there was no dissolution of the CHJ partnership and the merged partnership was liable for payments in accordance with the CHJ agreement The arbitrator denied the request to reconsider his ruling, citing the provision of the submission agreement limiting the evidence he could consider.

In January 2006, Whiteside filed two motions in the trial court, seeking to have the court vacate the arbitration award and to "submit documents *in*

camera." The second motion did not request permission to submit documents, but sought to have the trial court require CHJ and the other partners produce documents regarding their "dealings" with MHB between June and November 2000. The trial court denied both motions, confirmed the arbitration award, and rendered a take-nothing judgment against Whiteside in an order signed February 13, 2006. Whiteside now appeals that order.

LAW AND ANALYSIS

By his first issue, Whiteside asks us to determine whether the trial court erred in denying his motion to vacate the arbitration award. There is no dispute the arbitration proceeding, and our review of the trial court's action, are governed by the TGAA. Tex. Civ. Prac. & Rem. Code Ann. §§ 171.001-098

(Vernon 2005).3 That act protects the enforceability of written agreements to resolve disputes through binding arbitration. A trial court's review of an arbitration award is limited and deferential. *Universal Computer Systems, Inc. V. Dealer Solutions, L.L.C.*, 183 S.W.3d 741, 752 (Tex.App.–Houston [1st Dist.] 2005, pet. denied). On request of a party the court must confirm an award unless grounds for vacating, modifying or correcting the award are shown. Tex. Civ. Prac. & Rem. Code Ann. § 171.087 (Vernon 2005); *Women's Regional*

---

[3]Both parties also cite Texas and federal court cases applying the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16. State and federal jurisprudence in this area is largely consistent and the well-developed federal jurisprudence is instructive. *See In re D. Wilson Const. Co.*, 196 S.W.3d 774, 780 (Tex. 2006) (state and federal acts can apply simultaneously).

Healthcare v. Fempartners of North Texas, 175 S.W.3d 365, 367 (Tex.App.–Houston [1st Dist.] 2005, no pet.). Section 171.088 lists the ground on which an award may be vacated. When reviewing an arbitration award, every reasonable presumption must be indulged to uphold the arbitrator's decision, and none is indulged against it. *CVN v. Group, Inc. V. Delgado,* 95 S.W.3d 234, 238 (Tex. 2002), citing *San Antonio v. McKenzie Const. Co.,* 136 Tex. 315, 150 S.W.2d 989, 996 (1941). Review is so limited that a court may not vacate an arbitration award even if it is based on a mistake of fact or law. *Vernon E. Faulconer, Inc. V. HFI Ltd. Partnership.*, 970 S.W.2d 36, 39 (Tex.App.–Tyler 1998, no pet.). Judicial scrutiny focuses on integrity of process rather than propriety of result. *TUCO Inc. V.*

Burlington Northern RR. Co., 912 S.W.2d 311, 314 (Tex.App.–Amarillo 1995), *modified*, 960 W.W.2d 629 (Tex. 1997). An appellate court's review of the trial court's confirmation of the arbitration award is de novo. *Werline v. E.. Tex. Salt Water Disposal Co.*, No. 06-06-0039 CV, 2006, WL 3715907 (Tex.App.–Texarkana December 18, 2006, no pet. h.) (applying Texas common law). *See also Henry v. Haliburton Energy Services, Inc.*, 100 S.W.3d 505 (Tex.App.–Dallas 2003, pet. denied) (applying de novo standard in appellate review of order confirming award but reviewing ruling on motion for new trial for abuse of discretion).

Whiteside sought vacatur on three statutory grounds: (1) the arbitrator refused to hear evidence material to the controversy; (2) the arbitrator

exceeded his powers; and (3) the award was obtained by undue means. Tex. Civ. Prac. & Rem. Code Ann. § 171.088(a)(1), (3)(A), (3)(C) (Vernon 2005). His arguments in support of each ground are based on the absence of evident of appellees' dealings with the MHB firm prior to Whitesides's withdrawal from CHJ. He argues the arbitrator could not have determined whether the CHJ firm dissolved or merged with MHB, and rendition of an award without any evidence on that issue exceeded the arbitrator's powers. Tex. Civ. Prac. & Rem. Code Ann. § 171.088(3)(A) (Vernon 2005). Because, Whiteside contends, the evidence sought was necessary to the arbitrators decision, the refusal to consider it requires vacatur under section 171.088 (a)(3)(C). The "undue means" on which he relies is

CHJ's "withholding of its dealings with MHB" over proper requests for the documents. He characterizes this as fraudulent conduct which required vacatur under section 171.088(a)(1).

Appellees primarily rely on the submission agreement's limitation on the evidence to the partnership agreement and the parties' stipulated facts. Whiteside presents no challenge to the validity of the submission agreement. He seeks to avoid the agreement's evidentiary limitation by arguing the "arbitrator is not limited to what the parties agree or what information he is given," citing sections 171.050 and 171.051 of the TGAA. He also cites *Mewbourne Oil Co. V. Blackburn,* 793 S.W.2d 735 (Tex.App.–Amarillo 1990, orig. proceeding), for the proposition that the arbitrator was "empowered to cause the

discovery necessary to resolution of the issues before [him]. *Id.* At 737.

We reject Whiteside's view that minimizes the role of the submission agreement. An arbitrator's authority arises from the agreement of the parties. *Peacock v. Wave Tec Pools, Inc.* 107 S.W.3d 631, 636 (Tex.App.–Waco 2003, no pet.). A purpose of the TGAA is to ensure the enforceability of arbitration agreements. *See* Tex. Civ. Prac. & Rem. Code Ann. § 171.001 (Vernon 2005). Parties have wide latitude in structuring an arbitration proceeding through their agreement. *See TUCO*, 912 S.W.2d at 314 (citing FAA). Courts have given effect to arbitration agreements altering whether the question of arbitrability is one for the court or the arbitrator, *First Options of Chicago, Inc. V. Kaplan*, 514 U.S.

938, 947, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995), what procedural rules would apply, *Volt Information Sciences, Inc. V. Board of Trustees of Leland Stanford Univ.*, 489 U.S. 468, 477-78, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989), and even the standard for and extent of judicial review, *Gateway Technologies, Inc. V. MCI Telecommunications Corp.*, 64 F.3d 993, 996 (5th Cir. 1996); *Hughes Training Inc. V. Cook*, 254 F.3d 588, 590 (5th Cir. 2001); *Tanox, Inc. V. Akin Gump, Strauss, Hauer & Field, L.L.P.*, 105 S.W.3d 244, 251 (Tex.App.–Houston[14th Dist.] 2003, pet. denied) (applying federal arbitration law).

In review of the parties' express agreement limiting the evidence to be considered by the arbitrator, the trial court did not err in declining to vacate the arbitrator's award on the grounds he

exceeded his powers or refused to hear material evidence by giving effect to the agreement.[4] *See IPCO-G & C v. A.B. Chance Co.*, 65 S.W.3d 252, 259 (Tex.App.–Houston [1st Dist.] 2001, pet. denied) (court rejected challenge to award based on arbitrator's refusal to consider post-hearing evidence, relying on provisions of governing agreement granting arbitrator authority to determine relevance of evidence). Neither the general provisions of the TGAA allowing arbitrators to authorize depositions, § 171.050, and issue subpoenas, § 171.051, nor the

---

[4]Indeed, had the arbitrator disregarded the submission agreement his award could be subject to challenge on the basis he exceeded his powers. *See e.g., International Union of Operating Engineers v. Cooper Natural Resources*, 163 F.3d 916, 919 (5th Cir. 1999) (holding arbitrator did not have authority to ignore the parties' agreement in making award).

opinion in *Mewbourne Oil* suggest a contrary conclusion.

Whiteside's third ground argues appellees' "withholding of information of dealings with MHB was fraud requiring the trial court to vacate the award. He relies on *Karaha Bodas Co. V. Perusahaan Perambangan Minyak Dan Gas Bumi Negara,* 364 F.3d 274 (5th Cir. 2004), *cert. denied,* 543 U.S. 917, 125 S.Ct. 59, 160 L.Ed.2d 202 (2004), and *Prestige Ford v. Ford Dealer Computer Services, Inc.,* 324 F.3d 391 (5th Cir. 2003). In *Karaha Bodas* the court recited a three-pronged test for determining if an arbitration award was procured by fraud. *Id.* At 307. It requires a movant to establish (1) the fraud by clear and convincing evidence, (2) that it was not discoverable before or during the arbitration, and (3)

the fraud materially related to an issue in the arbitration. *Id.* The issue in *Prestige Ford* concerned the production of altered documents by a party in the course of an arbitration proceeding. The trial court and Fifth Circuit affirmed the award because the arbitrators declined to compel production of the documents, considered the argument the documents had been altered and reached a decision independent of the alleged fraud. *Id. at* 394-95. Under this record, neither case supports Whiteside's first issue.

Whiteside contends he properly requested the information through discovery and it was wrongly withheld by appellees. As evidence of his requests for the records, Whiteside points to electronic mail exchanges. A March 2005 message to Whiteside from Hunt addressed several matters, including

Whiteside's request for information concerning his former partners' dealings with MHB before Whiteside's withdrawal from CHJ. A second message from Hunt represented "the only contractual matter between CHJ and MHB" concerned the sale of equipment and office supplies and denied knowledge of other records or agreements between the firms. That message also declined to provide records concerning the other partners' "individual entry into MHB[.]"

Assuming, without deciding, that the test for fraud set out in *Karaha Bodas* is applicable under the TGAA,[5] the record here does not establish the elements of that test. Like in *Karaha Bodas,* the conduct of Whiteside challenges was known before

---

[5]The same test has been applied by at least one Texas court of appeals. *See Henry*, 100 S.W.3d at 510.

the arbitration hearing, precluding him from satisfying the second element. Far from pursuing his outstanding requests at the arbitration hearing, Whiteside entered into the submission agreement, including its express provision limiting the evidence to be considered. The agreement negates his assertion that appellees "wrongly" withheld the records. *See Karaha Bodas,* 364 F.3d at 304 (noting representation at conclusion of arbitration hearing that record had been "fully made")

Whiteside's contention the arbitrator had no evidence on which to decide whether the partners' actions constituted a dissolution or a merger with MHB without examination of CHJ's records of "dealings" with MHB is, at bottom, an attack on the sufficiency of the evidence on which the arbitrator

based his decision. Having reviewed the entirety of the material presented the trial court, we find the court reasonably could have considered Whiteside's arguments for vacatur as an effort to bootstrap an evidentiary sufficiency complaint into a statutory ground for vacatur. *See J.J. Gregory Gourmet Servies, Inc. V. Antone's Import Co.*, 927 S.W.2d 31, 33 (Tex.App.–Houston [1st Dist.] 1995, no writ) (absent statutory ground to vacate arbitrator's award, a complaint about sufficiency of the evidence to support the award provided the trial court no basis on which to vacate it). We find the trial court did not err in rejecting Whiteside's ground for vacation of the award, and overrule his first issue.

Whiteside's second issue assigns error to the trial court's failure to order production of documents

concerning dealings between CHJ and MHB for *in camera* review. Whiteside points to the authority given a trial court under section 171.086 of the TGAA to order discovery even after conclusion of the arbitration. Tex. Civ. Prac. & Rem. Code Ann. § 171.086(b). We will apply an abuse of discretion standard to our review of the trial court's denial of Whiteside's motion to require document production.[6] A court may abuse its discretion by ruling arbitrarily, unreasonably or without reference to any guiding rules and principles, or without supporting evidence. *Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998); *Morrow v. HEB, Inc.*, 714 S.W.2d 297,

---

[6]Subsection (a) of 171.086 expressly commits to the trial court's discretion pre-arbitration rulings on discovery and "other relief." Subsection (b) does not indicate any different standard should apply to rulings made during or after arbitration.

298 (Tex. 1986); *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex. 1985). Here, the court had before it the unchallenged submission agreement limiting the evidence to be considered by the arbitrator. We hold the trial court did not err in declining Whiteside's motion to compel production of documents for *in camera* review and overrule his second issue. Whiteside's third issue recasts the argument presented in his second issue and is likewise overruled, as is his pending motion seeking the same relief in this Court.[7] Having overruled

---

[7]Whiteside also filed a motion asking tht we supplement the record in this appeal with "sealed" documents contained in the record in the mandamus proceeding, *In re Whiteside*, No. 07-06-0078-CV, 2006 WL 1519430 (Tex.App.–Amarillo June 6, 2006, orig. proceeding). That motion is granted.

Whiteside's issues, we affirm the judgment of the trial court.

James T.

Campbell

Justice

COURT OF APPEALS

Seventh District of Texas

Potter County Courts Building

501 S. Fillmore, Suite 2-A

Amarillo, Texas 79101-2449

February 27, 2007

Tom H. Whiteside

WHITESIDE LAW FIRM

P.O. Box 2825

Lubbock, Texas 79408-2825

Donald M. Hunt

Latrelle Bright Joy

MULLIN HOARD & BROWN, L.L.P.

P.O. Box 2528

Lubbock, Texas 79408-2825

H. Grady Terrill, III

CRAIG, TERRILL, HALE & GRANTHAM, L.L.P.

P.O. Box 1979

Lubbock, Texas 79408-1979

Dear Counsel:

In cause No. 07-06-00207-CV, styled TOM H. WHITESIDE v. CARR, HUNT & JOY, L.L.P., DONALD M. HUNT, LATRELLE BRIGHT JOY AND GARY BELLAIR, from the 99th District Court of Lubbock County, the Court this day overruled Appellant's Motion for Rehearing.

Very truly yours,

PEGGY CULP, CLERK

By: /s/ Donna Artis

xc: Honorable William C. Sowder

Barbara Sucsy

Administrative Judge

Lois, Inc.

Lexis/Nexis

West Publishing

State Bar of Texas

THE STATE OF TEXAS

THE SUPREME COURT OF TEXAS

Orders Pronounced June 1, 2007

ORDERS ON PETITIONS FOR REVIEW

THE FOLLOWING PETITIONS FOR REVIEW ARE DENIED:

07-0310 TOM H. WHITESIDE v. CARR, HUNT & JOY, L.L.P., DONALD M. HUNT, LATRELLE BRIGHT JOY AND GARY BELLAIR from Lubbock Count; 7th district (07-06-00207-CV, ____SW3d ____, 01-23-07)

THE STATE OF TEXAS

THE SUPREME COURT OF TEXAS

Orders Pronounced July 27, 2007

ORDERS ON MOTIONS FOR REHEARING

THE MOTIONS FOR REHEARING OF THE FOLLOWING PETITIONS FOR REVIEW ARE DENIED:

07-0310 TOM H. WHITESIDE v. CARR, HUNT & JOY, L.L.P., DONALD M. HUNT, LATRELLE BRIGHT JOY AND GARY BELLAIR from Lubbock Count; 7th district (07-06-00207-CV, ____SW3d ____, 01-23-07)

91

(3)

FILED
APR 11 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

NO. 07-870

IN THE
SUPREME COURT OF THE UNITED STATES

Fall Term, 2007

TOM H. WHITESIDE,
Petitioner
v.
CARR, HUNT & JOY, L.L.P., DONALD M. HUNT, LATRELLE BRIGHT JOY AND GARY BELLAIR,
Respondents.

ON PETITION FOR REHEARING TO
THE TEXAS COURT OF APPEALS
FOR THE SEVENTH DISTRICT

PETITION FOR REHEARING

Tom H. Whiteside*
WHITESIDE LAW FIRM
1001 Texas Avenue, Suite 135
Lubbock, Texas 79401
Phone: (806) 687-9009
Facsimile: (806) 687-9011
* Counsel of Record, Member Supreme Court Bar

GROUNDS FOR REHEARING

1. Texas appellate review of arbitration which facilitates fraud is a denial of access and renders "hollow [the plaintiff's] right to seek redress." [1]

2. Under the authority of 128 USCS §2106, where the lower Court's decision is obscure or influenced by a mistaken view of the law resulting in the appearance of justice not having been satisfied, this Court has the power "to require such further proceedings as may be just under the circumstances" to remand the case to the Court of Appeals to order the arbitrator to examine CHJ's records and reassess his decision or and direct the Court of Appeals to reassess its fact findings and legal conclusions.

---

[1] Christopher v. Harbury, 536 U.S. 403, 414 (2002)

STATEMENT

It is the wisdom of history's teachers and judges which marks true access to justice. Historically, from Solomon's threat to cut the baby in half[2], to Daniel's separately questioning the condemning elders about Susanna[3], and Jesus' allowing Thomas to place his fingers in the wound, as stunningly shown by Caravaggio's "Incredulity of Saint Thomas"[4], to today's baseball arbitration, mass tort class action suits and Justices of the Peace solving neighbors' pet disputes, justice has been achieved by insuring to the extent possible that truth is exposed. Here, however, this arbitration has been marked by the extent to which the judges, from the arbitrator to the Texas Supreme Court, for one reason or

[2] 1 Kings 3:16-28 New Revised Standard Version.
[3] Susanna 47-63 New Revised Standard Version.
[4] "The Incredulity of Saint Thomas", Caravaggio, 1601-1602, oil on canvas, Sanssouci, Potsdam. Appendix

another have not sought to examine case concluding documents or find admitted fraud. Moreover, the Court of Appeals in deciding the merits confusingly misstated Whiteside's undue means argument and misapplied the law of "exceeded powers" leading to a strikingly wrong result. Thus this court should grant certiorari and order the Court of Appeals to order the arbitrator to examine CHJ's records of dealings with MHB and reassess his decision and direct the Court of Appeals to reexamine the facts and the law .

DENIAL OF ACCESS

How then did the Court of Appeals arbitrarily deny Whiteside meaningful access to the courts? Initially, what must be understood is the relative small size of the legal community in the panhandle of Texas. There are only two cities, Amarillo and Lubbock, in excess of 200,000

population in this area of Texas. The only law school in this area is Texas Tech in Lubbock. The firm in which CHJ merged is a relatively large firm with its main office in Amarillo and this satellite office in Lubbock. Unbeknownst to Whiteside, MHB began soliciting these CHJ lawyers to combine the firms, save Whiteside.[5] After apparently successful negotiations, Whiteside was informed in 2000 that he had to resign before the firms merged.[6] Whiteside withdrew on 10/31 and the next day CHJ and MHB became Mullen Hoard Brown Langston Carr Hunt & Joy in the same building with the same personnel.[7]

---

[5] In re Whiteside, 07-06-0078CV, 2006 WL 1519430 (Tex. App. – Amarillo June 2nd, 2006, orig. proceeding). In re Whiteside, 07-06-0078CV 2006 LEXIS 5839 (Tex. App. – Amarillo June 27, 2006, orig. proceeding).

[6] Id

[7] Id

Considering the above stated size of the legal community, this merger was presumably known by the Court of Appeals' Justices who are from either Lubbock or Amarillo. There are only four Justices in the Court of appeals with two assisting as senior Justices. In fact, one of the retired Justices, John Boyd, had been asked by Hunt to be the arbitrator in this case but declined because of a conflict of interest. Interestingly, this justice had been placed on a panel to hear Whiteside's mandamus and only withdrew after he had been reminded of his previously stated conflict. The other justice is Mackey K. Hancock who joined the Court in July of 2005 and had previously presided over this case in the Lubbock District Court before the same was referred to arbitration.

The other relevant factor is the Court of Appeals' familiarity with two of CHJ's former partners, Don Hunt and Gary Bellaire. Both are appellate law specialists and practice frequently in this Court of Appeals. Hunt has taught the moot court teams at the law school for years to much success.

Finally, the arbitrator's, Joe Nagy, firm Crenshaw Dupree Milam officed in the same building in Lubbock as MHB before and after the merger.

But attorneys going through a divorce with their partners have the potential for as much aberrant behavior as one may unfortunately witness in every divorce. Suddenly, people regarded as salt of the earth become a little crazy and the truth is not in them.

So here well respected lawyers become unreliable. To win these attorneys represented to peers that things were not as they seemed. They represented to the arbitrator that they had an absolute defense to Whiteside's admitted breach of contract claim——dissolution.[8] They contended that what was a partnership one minute dissolved

---

[8] Arbitration was held on September 27, 2005 with Joe H. Nagy, Sr. (hereinafter Nagy) as arbitrator under an agreement drafted and signed that day which provided pertinently: 1) "After November 1, 2000, Tom Whiteside was not paid pursuant to the said Paragraph, but was paid his participation percentage of the account receivables actually collected less his proportionate part of the expenses;" 2) "The parties agree that no evidence other than the contract will be considered at this hearing and the arbitrator will render a decision as a matter of law." The oral stipulations were as to the partnership agreement signed on March 1, 1995 and that on November 1, 2000 Hunt, Joy and Bellair joined MHB.

CHJ submitted their Brief on October 5, 2005 stating pertinently: "[D]issolution occurred pursuant to Paragraph 22a at the end of the day on 31 October 2000 ... [T]hat was both a dissolution by majority vote and by operation of law."

On October 25, 2005 Nagy issued his opinion finding no breach stating "[I]t was stipulated at the Arbitration hearing on September 27, 2005 that Tom Whiteside, Donald M. Hunt, Latrelle Bright Joy and Gary Bellair had terminated their relationship with Carr, Hunt & Joy, L.L.P. as of October 31, 2000. ... No other evidence or testimony was taken at the hearing."

For some reason the Court of Appeals in one part of its opinion assumed the "undue means" was the withheld evidence of dealings with MHB, not the fact CHJ misrepresented to the arbitrator it dissolved. *Whiteside v. Carr Hunt & Joy*, No. 07-06-0207-CV, 2007 WL 172028 (Tex. App. – Amarillo January 23, 2007) at p.4. Yet, later in its opinion, the Court of Appeals dismissed as an attack on the sufficiency of the evidence "Whiteside's contention the arbitrator had no evidence on which to decide whether the partner's actions constituted a dissolution or a merger without examination of CHJ's records of 'dealings' with MHB ...". Id at p.5.

the next. Despite later retreating from the claim of an actual dissolution, they continued to contend a dissolution occurred since "they voted with their feet".[9] (The partnership agreement required a vote to dissolve). Nevertheless, neither the arbitrator, the Trial Court, the Court of Appeals, or the Texas Supreme Court seemed concerned that officers of the Court had committed fraud to keep from paying a partner under the contract. Instead, the above entities accepted CHJ's argument that fraud was no defense because it could not be proven without the withheld documents. Despite Whiteside's request to the arbitrator, the Trial Court, the Court of Appeals and the Texas Supreme Court to examine CHJ's documents of

[9] On November 4, 2005 CHJ responded pertinently stating "...while no formal meeting was held or a vote taken, Hunt, Joy and Bellair voted with their feet ..."

dealings with MHB in camera to see if its claim was true, all demurred.

The height of arbitrariness of the Court of Appeals' decision is its "Catch 22"[10] argument that Whiteside could not show fraud under *Karaha Bodas*[11] because he was aware of the fraud before arbitration but agreed to limit the evidence to be considered which "negates his assertion that Appellees 'wrongly' withheld the records"[12] . But the undue means vacatur ground Whiteside asserted was not CHJ's withholding from Whiteside its merger talks but CHJ's representation to the arbitrator in its

---

[10] Joseph Heller. Catch 22. USA: Simon & Schuster, 1961.

[11] *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negra*, 364 F.3d 274 (5th Cir 2004), *cert. denied*, 543 U.S. 917, 125 S. Ct. 59, 160 L.Ed2d 202 (2004).

[12] *Whiteside v. Carr Hunt & Joy*, No. 07-06-0207-CV, 2007 WL 172028 (Tex. App. – Amarillo January 23, 2007). (The "undue means on which he relies is CHJ's 'withholding of its dealings with MHB")

presubmission brief, not submitted to Whiteside, that it dissolved.

The Court of Appeals further misstated the law in dismissing Whiteside's complaint of the arbitrator's exceeding his powers in finding a dissolution to be an "effort to bootstrap an evidentiary sufficiency complaint into a statutory ground for vacatur".[13] However, the arbitrator exceeds his powers if an award is not "rationally inferable from the facts" before him or he manifestly disregards the law if he commits an error "obvious and capable of being instantly perceived by the average person qualified to be an arbitrator" that results in "signifcant injustice." *Kergosien v Ocean Energy, Inc.*, 390 F.3d 346, 353-355 (5th Cir, 2004). Thus, the Court of Appeals stunningly contended that Whiteside could not

[13] See footnote 8.

complain about CHJ's failure to include evidence of dissolution in the submission agreement much less that CHJ admitted to the arbitrator that it had not actually dissolved.

REMAND

This Court has under 28 USC §2106 remanded cases to lower courts where the appearance of justice was not satisfied, where the lower court had a mistaken view of the law and to clarify the record. In *Proctor v. Warden, Maryland Penitentiary, 435 US 559, 560 (1978),* this Court relied on § 2106 in vacating a Court of Appeals plainly mistaken decision on a prisoner's claim ruling that "justice must satisfy the appearance of justice" (citations omitted). In *U.S. Postal Service Board of Governors v. Aikens, 460 U.S. 711 (1983),* this Court further invoked § 2106 in remanding to the District Court for its mistaken view of the law

of discriminatory intent. Finally, this Court in *Capital Cities Media, Inc. v. Toole, 466 U.S. 378* vacated a State Court judgment which did not disclose if that Court had ruled on federal claims and remanded to that Court to "clarify the record". A remand to the Court of Appeals to order the documents examined by the arbitrator, reassess the facts and reconsider the law will finally make the truth, as it did to Thomas, become evident.

CONCLUSION

For the reasons stated, Whiteside urges that this petition for rehearing be granted, that the Court remand and order the Court of Appeals to order the withheld documents examined by the arbitrator and correct its errors of fact and law.

Respectfully submitted,

Tom H. Whiteside

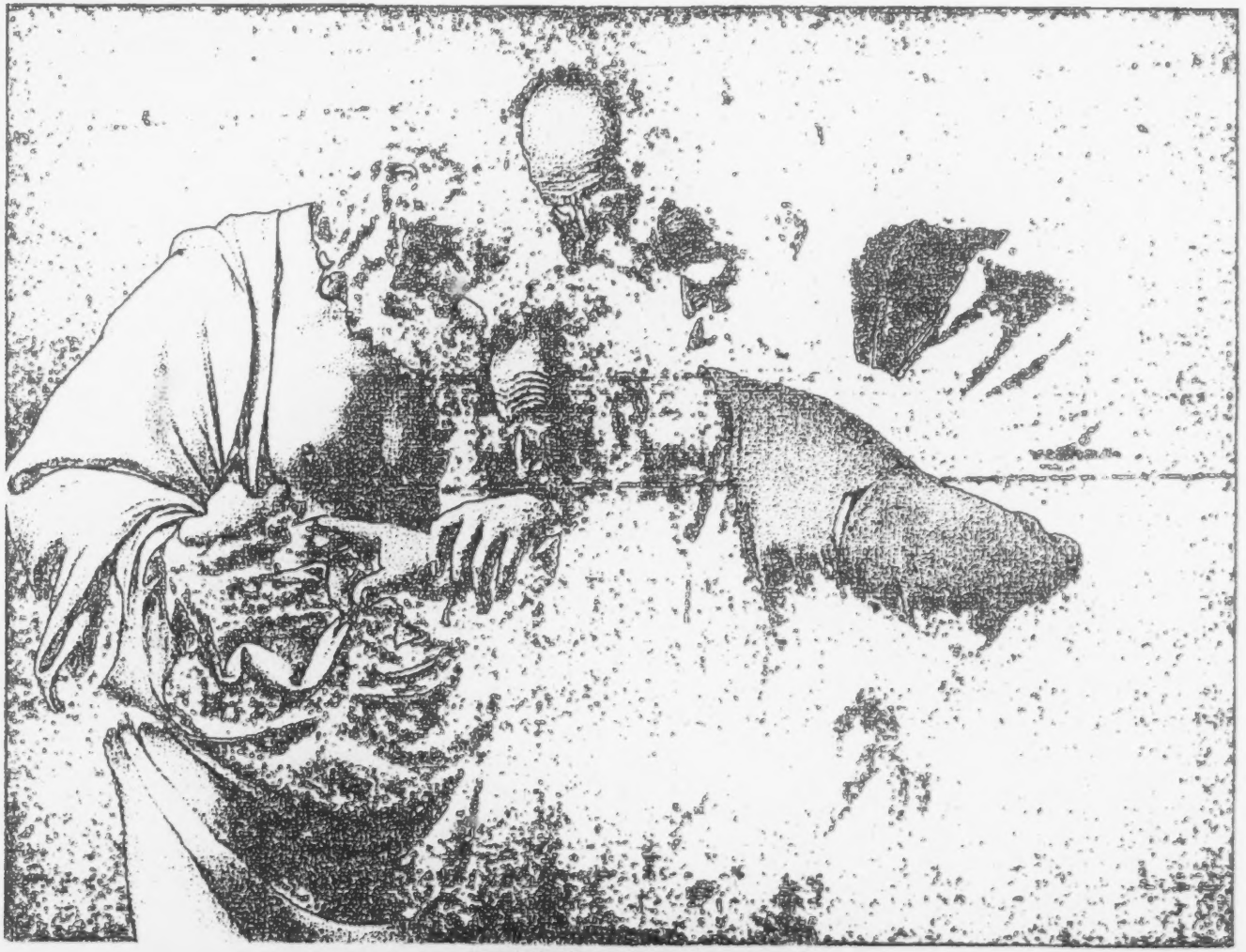
WHITESIDE LAWFIRM
1001 Texas Avenue
Lubbock, Texas 79401
(806) 687-9009
Attorney for Petitioner

CERTIFICATE OF COUNSEL

I, Tom H. Whiteside, counsel for Tom H. Whiteside, certify that the this Petition for Rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Supreme Court Rule 44 of the Rules of this Court.

APPENDIX

The Incredulity of Thomas, by Michelangelo Merisi da Caravaggio



BEST AVAILABLE COPY